No. 68

JUL 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS SAID PETITION.

WILLIAM S. KLEINMAN,
Attorney for Respondent.

BARNARD & MILLER, Printers, FRAnklin 0562, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No.....

R. H. DAVIS, trading as DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, a corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court
Of The United States:

We respectfully submit to the Court that neither in the Appellate Court of Illinois, nor in the briefs filed in this Court does the Petitioner deny that he is guilty of the charge of conversion made against him by the Respondent. The Petitioner's position appears to be, in substance, that

the Trial Court having made inconsistent findings as to the extent of his guilt he should have been entirely purged of liability. The Petitioner, however, ignores the fact that the general finding of guilty conforms entirely to the allegations in the count in trover, as well as to the replication filed by this Respondent to the Petitioner's plea in the Trial Court.

The evidence of Respondent's title to the automobile involved in this suit is represented by the three-fold document introduced in evidence as Plaintiff's Exhibit 1 (R. 9), and which is in the nature of a chattel mortgage and note, bill of sale and trust receipt. Whatever criticism may be directed towards the efficacy of such a document it is unquestionably true that what was intended by this instrument, was the ultimate amount of protection which Respondent could possibly obtain while the automobile in question was in the Petitioner's possession.

An examination of this instrument reveals that regardless as to what may be its technical designation, it is nevertheless true that each portion thereof establishes absolute title to the automobile in the Respondent. Petitioner's right to employ this automobile was strictly limited by the terms of this contract, one salient feature of which is the following paragraph:

> "I (we) agree not to sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of any of said property to any other person except upon written order from said corporation or release from trust, upon payment to said corporation of the amount required by said order, and upon the endorsement on the back of this Trust Receipt by said Corporation of a release from Trust."

In disregard of the terms of the contract, including the above provision, this Petitioner sold Respondent's automo-

bile, and after a number of demands had been made upon him for payment, which he did not comply with, the Petitioner about a month after this sale, filed his voluntary petition in bankruptcy. Testing the Petitioner's conduct in the light of the provisions of this contract, particularly the above quotation, the Petitioner was unquestionably a bailee or trustee of this automobile; his sale thereof without obtaining a release and without accounting for the proceeds was certainly "fraud, embezzlement, misappropriation, or defalcation", while acting in a "fiduciary capacity"; this brings Petitioner squarely within the exceptions to the discharge provision of the Bankruptcy Act. In the bankruptcy schedules, this Respondent is listed as an unsecured creditor in the sum of $50.00, and is likewise listed as a creditor by virtue of this Petitioner's endorsements on four installment notes which total $2,287.20. (R. 14.)

Notwithstanding the Petitioner's present contention of alleged indebtedness by the Respondent to him for certain credit items, a reference to his schedules B3 and B4, which were introduced in evidence by this Respondent, fails to show any indebtedness whatsoever. (R. 24.) Petitioner must doubtless be held to the truth of his sworn schedules.

This proceeding clearly comes within the rule of *McIntyre* v. *Kavanaugh,* 242 U. S. 138. The opinion of the Appellate Court of Illinois is consistent with the Federal Court rule on the proposition that a judgment in trover for conversion of property, under circumstances such as is disclosed by this record, is one for "wilful and malicious injuries", as would bring this case within the exception to the discharge provision of the Bankruptcy Act.

In re Brier, 3 Fed. (2d) 709.

In re Nordlight, 3 F. Supp. 486.

Regardless as to what process of reasoning the Appellate Court employed in arriving at its conclusion, the judgment was proper and fully justified by the record.

We therefore respectfully submit that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

.....

WILLIAM S. KLEINMAN,
Attorney for Respondent.

MOTION OF RESPONDENT TO DISMISS THE PETITION FOR A WRIT OF CERTIORARI FOR WANT OF JURISDICTION.

The Petitioner bases his right to appeal to this Court on the ground that his petition to the Appellate Court of Illinois for a Certificate of Importance to the Supreme Court of Illinois was denied; he therefore alleges that the Appellate Court of Illinois is the highest court of the State in which a decision in this case could be had. This position would doubtless be true if this Petitioner had fully complied with the rules of the Appellate Court of Illinois with respect to the necessary requirements of such a petition for a Certificate of Importance. From the printed record, it does not appear that a copy of his petition for a Certificate of Importance was filed in this Court. Respondent has therefore caused to be prepared and has filed in this Court, with this Reply, a Certified copy of the original petition for a Certificate of Importance, which it asks leave of Court to make a part of this record.

The right to appeal from the Appellate Court to the Supreme Court of Illinois in any judgment in an amount less than $1,500.00, on the ground of importance is governed by Chapter 110, Section 199, Smith-Hurd Illinois Revised Statutes 1933, in the second paragraph of which is the following sentence:

> "* * * In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them, involved a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court

shall certify to the Supreme Court the grounds of granting said appeal. * * *"

We respectfully draw the Court's attention to Rule 22 of the Rules of the Appellate Court of Illinois, First District, which is as follows:

"RULE 22.

CERTIFICATE OF IMPORTANCE.

(1) When the Appellate Court has granted leave to appeal to the Supreme Court on the ground of importance, the clerk of the Appellate Court shall transmit to the clerk of the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto, and the certificate of importance of the Appellate Court. Applications for leave to appeal on the ground of importance shall be made by printed or typewritten petitions clearly setting forth the grounds relied upon by the party asking the same, and must be presented to the court, if in session, or to a majority of the judges, if in vacation, within twenty days after entry of judgment in the Appellate Court. The Appellate Court may require bond as a condition of granting leave to appeal on the ground of importance."

The salient portion of the Petitioner's petition for leave to appeal to the Supreme Court, on the ground of importance, is as follows:

"Your petitioner further respectfully represents, that he is informed and believes, and so states the fact to be, that the matters in issue presented in said cause have never been passed upon or presented before the Supreme Court of this State; that he deems that the issues involved in said cause are of such importance that they be presented to the Supreme Court of this State for its decision."

It is needless to say that Petitioner made no effort to comply with Rule 22 above quoted, which requires that "* * * application for leave to appeal on the ground of importance shall be made by printed or typewritten petitions *clearly setting forth the grounds relied upon by the party asking the same,* * * *." Having violated or disregarded this rule in failing to clearly set forth the grounds upon which he relied, if he had any such grounds, it is quite obvious why the Appellate Court denied his petition. We believe it to be axiomatic that Petitioner's violation or his wilful failure to comply with a definite rule of the Appellate Court of Illinois, should not be the means of permitting him to appeal to this Court. If he had grounds for appealing to the Supreme Court of Illinois, he should have set them out clearly, as the rule provides; not having done so, but having filed a document which is based upon "information and belief" and does not bear the remotest resemblance to a petition for a Certificate of Importance, he should be barred from employing the denial of such a petition as a means of appealing to this Court.

We therefore respectfully move this Honorable Court to strike the petition for a Writ of Certiorari, for want of jurisdiction, and to dismiss said proceeding.

Respectfully submitted,

.....

WILLIAM S. KLEINMAN,
Attorney for Respondent.